

The European Court of Justice and the Comparative Law Method

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Abstract: The European Court of Justice (the ‘ECJ’) must ensure the uniform interpretation of the laws of the EU, whilst deferring to the common constitutional traditions of the Member States and, where necessary, allowing room for value diversity. To that end, the authors of the Treaties vested the ECJ with the constitutional authority to engage in a comparative study of the laws of the Member States. The purpose of this article is thus to explore the comparative law method by examining, first, that constitutional authority, second, the ‘EU federal common law’, third, the relationship between that method and the extent of normative convergence between the legal orders of the Member States and, fourth, the so-called ‘evaluative approach’ adopted by the ECJ. It is submitted that the comparative law method is a valuable interpretative tool that enables the ECJ to strike a dynamic balance between ‘unity’ and ‘diversity’.

Résumé: La Cour de justice (‘CJ’) doit assurer l’interprétation uniforme du droit de l’Union européenne, tout en respectant les traditions constitutionnelles communes aux Etats membres et, si nécessaire, en faisant place à la diversité. Dans ce but, les auteurs des traités ont conféré à la CJ l’autorité constitutionnelle de procéder à une étude comparative des droits des Etats membres. L’objectif de cet article est, dès lors, d’examiner la méthode comparative en étudiant, premièrement, cette autorité constitutionnelle, deuxièmement, la ‘EU federal common law’, troisièmement, le rapport entre cette méthode et le degré de convergence normative entre les ordres juridiques des Etats membres et, quatrièmement, l’approche dite évaluative, adoptée par la CJ. Il en est conclu que la méthode comparative est un outil précieux d’interprétation qui permet à la CJ de trouver un équilibre dynamique entre ‘unité’ et ‘diversité’.

Zusammenfassung: Der Europäische Gerichtshof (EuGH) muss die einheitliche Interpretation des Unionsrechts sicherstellen und dabei gleichzeitig auf die gemeinsamen verfassungsrechtlichen Traditionen der Mitgliedstaaten Rücksicht nehmen sowie erforderlichenfalls Raum für unterschiedliche Wertvorstellungen lassen. Dafür statteten die Autoren der EU-Verträge den EuGH mit der Kompetenz aus, vergleichende Untersuchungen des Rechts der Mitgliedstaaten anzustellen. Ziel des vorliegenden Beitrages ist es, diese rechtsvergleichende Methode des EuGH zu untersuchen, indem zuerst die Kompetenz nach den Verträgen, in einem zweiten Schritt das ‘EU federal common law’, drittens die Beziehung zwischen der Methode und dem Ausmaß normativer Konvergenz zwischen den Rechtsordnungen der Mitgliedstaaten und schließlich der vom EuGH angewandte sogenannte „evaluative

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Ansatz“ betrachtet werden. Der Beitrag kommt zu dem Schluss, dass die rechtsvergleichende Methode ein wertvolles Interpretationsinstrument ist, das dem EuGH ermöglicht, eine dynamische Balance zwischen „Einheit“ und „Differenz“ herzustellen.

1. ‘United in diversity’ reads the motto of the European Union (the ‘EU’). Europeans are united because each and every European citizen firmly believes in respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. They are also united because pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men are the founding values of all European societies.

At the same time, diversity pervades the four corners of Europe from the Gulf of Finland to the Strait of Gibraltar and from the Irish Sea to the Aegean. This was known to the authors of the Treaties, who rightly decided that the EU ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced’.¹ Value diversity must, where possible, be respected and preserved by the EU.

2. However, if the two elements of the motto ‘United in diversity’ were to be understood in absolute terms, their coexistence would become impossible to achieve. Absolute unity rules out any hope of national diversity. Absolute diversity leads to the fragmentation of the EU.

The concealed message behind that motto is, in my view, that of finding a dynamic balance between those two competing elements, without one always prevailing over the other as only the two together give real meaning to European integration. Accordingly, unity does not mean that national traditions and culture must be set aside. Nor does diversity preclude the existence of a commonality of Pan-European values.

3. For the European Court of Justice (the ‘ECJ’), this means, in essence, that the law of the EU must be read in a way that accommodates that dynamic balance. The ECJ must provide a uniform interpretation of the laws of the EU, whilst deferring to the common constitutional traditions of the Member States and, as the case may be, allowing room for value diversity. To that end, the authors of the Treaties vested the ECJ with the constitutional authority to engage in a comparative study of the laws of the Member States. The comparative law method is thus a valuable interpretative tool that serves to strike that dynamic balance.

1 Art. 3(3) TEU.

1. The Constitutional Authority to Apply the Comparative Law Method

4. The constitutional authority to engage in such a comparative study is, first and foremost, grounded in Article 19 TEU, according to which the ECJ is to ensure that in the interpretation and application of the Treaties the law is observed.² Compliance with the rule of law implies that the ECJ must solve the cases over which it enjoys jurisdiction even if that means finding the law (*‘Rechtsfindung’*). As the ECJ held in the seminal *Algera* case, ‘unless the [ECJ] is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the [Member States]’.³ Compliance with the rule of law within the EU may thus require the ECJ to apply the comparative law method.

5. Moreover, two additional Treaty provisions explicitly refer to the laws of the Member States, namely Article 6(3) TEU and Article 340(2) TFEU. Those two provisions relate respectively to the protection of fundamental rights and to the EU’s non-contractual liability.

Article 6(3) TEU mandates the EU to respect ‘[f]undamental rights, as guaranteed by the [ECHR] and as they result from *the constitutional traditions common to the Member States*,⁴ [which] shall constitute general principles of the Union’s law’. That Treaty provision is no less than an explicit endorsement by the authors of the Maastricht Treaty of the case law of the ECJ in the field of fundamental rights protection. Likewise, Article 52(4) of the Charter of Fundamental Rights of the European Union (the ‘Charter’) imposes the same obligation on the ECJ as it states that ‘[in] so far as [the] Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions’.

6. By stating that the principle of non-contractual liability of the EU is to be developed ‘in accordance with *the general principles common to the laws of the Member States*’,⁵ Article 340 TFEU clearly indicates that the authors of the

2 See K. LENAERTS, ‘Interlocking Legal Orders in the European Union and Comparative Law’, 52. *International and Comparative Law Quarterly* 2003, p 873. See also K. LENAERTS & J.A. GUTIERREZ-FONS, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, 20. *Columbia Journal of European Law* 2014, p (3) at 44, and K. LENAERTS & K. GUTMAN, ‘The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited’, in M. Andenas & D. Fairgrieve (eds), *Courts and Comparative Law* (Oxford: Oxford University Press 2015), p 141.

3 ECJ 12 July 1957, *Algera and Others / Assemblée commune*, 7/56 and 3/57 to 7/57, EU:C:1957:7, curia.europa.eu/juris/documents.jsf?num=C-7/56, at 55.

4 Emphasis added.

5 See Art. 340(2) TFEU (emphasis added).

Treaties envisaged recourse to the comparative law method as a means of filling lacunae in the legal order of the EU.

In the *FIAMM* case,⁶ for example, the ECJ ruled that the EU could not be held liable in the absence of an unlawful act or omission on its part. The ECJ reached that determination by engaging in a comparative examination of the Member States' legal systems from which it deduced that there was no convergence of those legal systems 'as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature'.⁷

Similarly, in the *Gascogne* case, the ECJ had to determine the appropriate remedy where the European General Court has failed to adjudicate within a reasonable time in competition cases. AG Sharpston noted that there was no common remedy at national level.⁸ For example, she observed that some Member States choose to reduce the penalty imposed on the infringing undertaking, whilst other provide for a separate action for damages.

Accordingly, in the absence of a common approach, she invited the ECJ to choose the appropriate remedy in the light of Article 47 of the Charter, a provision that enshrines the right to effective judicial protection.⁹ In that regard, the ECJ held that a separate action for damages was the right remedy.

2. The 'Federal Common Law' in the EU

7. The scope of application of the comparative law method is not limited to primary EU law, i.e. to discovering general principles of EU law and interpreting provisions of the Charter. That method of interpretation has also been relied upon by the ECJ with a view to clarifying specific provisions of secondary EU law. Moreover, this method provides a good framework for the ECJ to undertake what I have called 'federal common law-making'.¹⁰

8. The interpretation of the term 'spouse' in secondary EU legislation may illustrate this point. As you all know, the EU lacks the competences in family matters such as who has the right to get married with whom. However, the term 'spouse' can be found in secondary EU legislation. For example, that term can be

6 ECJ 9 September 2008, *FIAMM and Others / Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, curia.europa.eu/juris/documents.jsf?num=C-120/06.

7 *Ibid.*, para. 175.

8 Opinion of Advocate General Sharpston in *Groupe Gascogne / Commission*, C-40/12 P, C-50/12 P and C-58/12 P, EU:C:2013:360, curia.europa.eu/juris/documents.jsf?num=C-140/12, para. 118.

9 *Ibid.*, para. 121.

10 K. LENAERTS & K. GUTMAN, "Federal Common Law" in the European Union: A Comparative Perspective from the United States', 54. *American Journal of Comparative Law* 2006, p 55.

found in the Staff Regulations,¹¹ the EU Citizen's Directive¹² and the Family Reunification Directive.¹³

The EU Citizen's Directive provides that the 'spouse' of an EU citizen may benefit from the rights laid down in that Directive. However, the relevant provision of the EU Citizen's Directive does not provide a definition of the term 'spouse'. To date, whether that term could be interpreted as including same-sex spouses remains an open question.

In the past, the ECJ has interpreted the term 'spouse' on two occasions. In *Reed*,¹⁴ a case decided in 1986 that concerned the interpretation of Regulation 1612/68 on the free movement of workers,¹⁵ the ECJ held that an unmarried person who is in a stable relationship with a worker who has exercised his right to free movement could *not* be treated as a 'spouse' for the purpose of that Regulation. In so doing, the ECJ found that, at the material time, there was no consensus among the Member States on whether unmarried companions should be treated as spouses.

Later, in *D and Sweden v. Council*,¹⁶ a staff case decided in 2001, the ECJ refused to interpret the expression 'married official' set out in the Staff Regulations as meaning that the situation of an official who had entered into a same-sex partnership recognized by some Member States was comparable to that of a married official. To that effect, the ECJ held that '[i]t is not in question that, according to the definition generally accepted by the Member States, the term "marriage" means a union between two persons of the opposite sex'.¹⁷

9. However, since those two judgments were delivered, the legal and social context has evolved at both EU and national level. At EU level, according to the most recent Staff Regulations, EU officials in a non-marital relationship recognized

11 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, [1962] OJ P 45/1385, data.europa.eu/eli/reg/1962/31 (1)/2014-07-01.

12 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77, data.europa.eu/eli/dir/2004/38/oj.

13 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12, data.europa.eu/eli/dir/2003/86/oj.

14 ECJ 17 April 1986, *Reed*, EU:C:1986:157, curia.europa.eu/juris/documents.jsf?num=C-59/85.

15 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] OJ L 257/2, data.europa.eu/eli/reg/1968/1612/oj.

16 ECJ 31 May 2001, *D and Sweden / Council*, C-122/99 P and C-125/99 P, EU:C:2001:304, <http://curia.europa.eu/juris/documents.jsf?num=C-122/99>.

17 *Ibid.*, para. 34.

by a Member State as a stable partnership who do not have legal access to marriage should be granted the same range of benefits as married couples.

At national level, the ECJ has held that, in so far as national law treats marriage and same-sex partnerships alike, any discriminatory treatment regarding benefits deriving from an employment relationship would be contrary to the principle of non-discrimination on grounds of sexual orientation as given expression in Directive 2000/78.¹⁸ For example, if under national law marriage and same-sex partnerships stand on an equal footing in the relevant respect, a national measure limiting survivors' benefits under a compulsory occupational pensions scheme to surviving spouses would run counter to the principle of equal treatment.¹⁹

10. Thus, it will be interesting to see how the ECJ will interpret the term 'spouse' for the purposes of secondary EU law, notably the EU Citizen's Directive. This is because the interpretation of that term raises a difficult constitutional question that requires the ECJ to strike the right balance between competing interests.

On the one hand, no one would question the proposition that legalizing same-sex marriage is a political decision to be taken at national level. In the absence of consensus among the Member States, that question gives rise to value diversity within the EU.²⁰ To date, whilst 11 Member States allow for same-sex marriage,²¹ the constitutions of seven Member States define specifically marriage as a union between a man and a woman.²² That said, a significant majority of Member States provide for some sort of legal recognition for same-sex couples, often equivalent to marriage,²³ and applicable to marriages legally entered into in another Member State.²⁴

On the other hand, the term 'spouse' defines the scope of free movement law *ratione personae*: it is only where same-sex married couples move to a Member State where their civil status is recognized that they can fully benefit from the

18 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16, ELI: <http://data.europa.eu/eli/dir/2000/78/oj>.

19 See e.g. ECJ 1 April 2008, *Maruko*, EU:C:2008:179, <http://curia.europa.eu/juris/documents.jsf?num=C-267/06>; ECJ 10 May 2011, *Römer*, EU:C:2011:286, <http://curia.europa.eu/juris/documents.jsf?num=C-147/08>; ECJ 6 December 2012, *Dittrich and others*, C-124/11, C-125/11 and C-143/11, EU:C:2012:771, curia.europa.eu/juris/documents.jsf?num=C-124/11; ECJ 12 December 2013, *Hay*, EU:C:2013:823, curia.europa.eu/juris/documents.jsf?num=C-267/12.

20 See Fundamental Rights Agency, 'Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU – Comparative Legal Analysis – Update 2015', fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015, p 85 et seq.

21 Belgium, Netherlands, Spain, Sweden, Portugal, Denmark, France, the United Kingdom, Luxembourg, Finland (as of 2017), and Ireland.

22 See, e.g. Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia.

23 See ECtHR of 21 July 2015 in *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611, hudoc.echr.coe.int/eng?i=001-156265, § 53 to 55 and 178.

24 See e.g. Croatia.

protection of EU law. That is even more so where one of the same-sex spouses is a third-country national, since he or she may only enjoy a derived right to free movement.²⁵

11. If a national court were to ask for guidance in the interpretation of the term ‘spouse’ for the purposes of the EU Citizen’s Directive, the ECJ would have no choice but to answer. Several approaches are theoretically possible.

First, there is the ‘autonomous concept’ approach to the definition of the term ‘spouse’ for the purposes of the EU Citizen’s Directive.²⁶ Such an approach would foster uniformity and legal certainty, but it might hurt the sensitivities of some Member States. Yet, it was this approach that was adopted by the US Supreme Court in the seminal *Obergefell v. Hodges* case,²⁷ where it held that the US Constitution confers a constitutional right to marry on same-sex couples, irrespective of the contents of the laws of the fifty States.

A second approach defers to the laws of the host Member State as to the definition of the term ‘spouse’; possibly with some nuances so as to exclude obstacles to the right of free movement.

A third approach relies on the law under which the marriage is entered into. This approach appears to be the most favourable to the exercise of free movement rights because the civil status of the persons concerned does not change.

A fourth and more nuanced approach could be to apply the principle of mutual recognition when interpreting the term ‘spouse’: a marriage entered into under the laws of the home Member State is to be recognized in the host Member State unless the latter puts forward overriding reasons of general interest in order to deny its legal recognition.

Finally, a combination of some of these approaches is not to be excluded either.

12. Be that as it may, this example shows that the comparative law method is a valuable interpretative tool that serves the ECJ to resolve particular gaps, conflicts and ambiguities, at constitutional or at legislative level.

Most importantly, cases such as *FIAMM*, *Gascogne*, *Reed* and *D and Sweden v. Council* demonstrate that there is a strong correlation between the degree of convergence existing among the different national legal systems and the deference shown to national law by the ECJ.

25 See, e.g. ECJ 12 March 2014, *O. and B.*, EU:C:2014:135, curia.europa.eu/juris/documents.jsf?num=C-456/12, para. 36.

26 See, in this regard, S. TITSHAW, ‘Same-Sex Spouses Lost in Translation? How to Interpret “Spouse” in the E.U. Family Migration Directives’, 34. *Boston University International Law Journal* 2016, p 45.

27 US Supreme Court 26 June 2015, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

3. National Convergence and the Comparative Law Method

13. The more convergence there is among the legal orders of the Member States, the more the ECJ will tend to follow in their footsteps. Where convergence is not total but a particular approach is common to a large majority of Member State legal systems, then the ECJ will normally follow that approach, adapting and developing it to fit within the EU context.

A good example is provided by the *Berlusconi* case, where the ECJ held that '[t]he principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States'.²⁸ In so doing, the ECJ implicitly relied on the comparative study undertaken by AG Kokott who stressed the fact that '[that principle is] established in the (...) legal systems of almost [all Member States]'.²⁹

14. Conversely, in the absence of a consensus, it appears that the ECJ would act with caution so as to avoid making choices of a moral or ethical nature that do not find support in the societies of the Member States. Where there are important divergences among Member State legal systems, the ECJ will not make general statements of a medical or ethical nature, but limit itself to interpreting the EU provision in question. Two examples taken from the case law of the ECJ in the field of social law that concern Directive 92/85 may illustrate this point.³⁰

15. In the early 1990s, the EU legislator adopted Directive 92/85 which aims to avoid the risk of a dismissal, for reasons linked to the pregnancy, having harmful effects on the physical and mental state of pregnant workers. It is worth noting that this Directive does not define the time at which pregnancy starts. This is an important issue since it is at that very moment that the protective measures laid down in the Directive begin to apply. It is worth recalling that Directive 92/85 applies, *ratione personae*, to female workers who are pregnant, have recently given birth, and/or are breastfeeding.³¹

Whilst this would normally seem to be a straightforward question, medical science may, sometimes, prove otherwise. In *Mayr*,³² a female worker was dismissed whilst she was undergoing *in vitro* fertilization treatment. As a result of that

28 ECJ 3 May 2005, *Berlusconi and others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, curia.europa.eu/juris/documents.jsf?num=C-391/02, para. 68.

29 Opinion of Advocate General Kokott in Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and others*, EU:C:2004:624, para. 156 (the UK and Ireland were, at that time, the only exceptions).

30 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [1992] OJ L 348/1, data.europa.eu/eli/dir/1992/95/oj.

31 See Art. 2 of Dir. 92/85.

32 ECJ 26 February 2008, *Mayr*, EU:C:2008:119, curia.europa.eu/juris/documents.jsf?num=C-506/06.

treatment, she was feeling sick and could not come to work. At the time of the dismissal, her ova had already been fertilized by her partner's sperm cells, but those ova had not yet been transferred to her uterus. Thus, the ECJ was called upon to determine whether that female worker was dismissed at a time when she was pregnant.

In carrying out its analysis, the ECJ stressed the fact that it did not intend to solve questions of a medical or ethical nature, but merely to interpret the meaning of the term 'pregnant' for the purposes of Directive 92/85.

In order to ensure the safety and protection of pregnant workers, the ECJ noted that it is the earliest possible date in a pregnancy which must be chosen. Nevertheless, compliance with the principle of legal certainty prevents pregnancy from beginning before the ova are transferred to the uterus. Since it was both legally and medically possible to keep the fertilized ova outside the uterus for many years, applying the protection against dismissal laid down in Directive 92/85 in favour of a female worker before that transfer could have the effect of granting the benefit of that protection for many years or even indefinitely where the transfer is postponed or abandoned, the *in vitro* fertilization having been carried out merely by way of a precaution.

This meant that Mrs Mayr was not dismissed when she was pregnant for the purposes of Directive 92/85. That being said, the ECJ observed that a dismissal could constitute direct discrimination on grounds of sex, if a female worker is dismissed on account of absence due to illness brought about by the *in vitro* fertilization treatment that she is undergoing. Accordingly, such a dismissal would run counter to the principle of equal treatment for women and men which was at the time, as regards working conditions, implemented by Directive 76/207 (now Directive 2006/54).³³

16. In the last decades, medical science has also advanced so that it is now possible to have a baby through a surrogacy arrangement. That development, like any scientific breakthrough, had an impact on the way in which our societies may understand the concept of 'motherhood', a concept that is of paramount importance for the purposes of social protection.

For example, from the perspective of social law, who is entitled to maternity leave as provided for by Directive 92/85, the commissioning mother or the surrogate mother, or both? In the *C.D.* and *Z.* cases,³⁴ the ECJ was confronted with that very question.

33 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, [2006] OJ L 204/23, data.europa.eu/eli/dir/2006/54/oj.

34 ECJ 18 March 2014, *C.D.*, EU:C:2014:169, curia.europa.eu/juris/documents.jsf?num=C-167/12; and ECJ 18 March 2014, *Z.*, EU:C:2014:159, curia.europa.eu/juris/documents.jsf?num=C-363/12.

17. Whilst those two cases were allocated to the same reporting judge, two different Advocates General were assigned to them, i.e. AG Wahl wrote the Opinion in the *Z.* case and AG Kokott did so in the *C.D.* Case.

At the outset, both Advocates General concurred in that the laws of the Member States provided no answer to the question at issue. In *Z.*, AG Wahl observed that ‘the legislative landscape is varied in the Member States: surrogacy ranges from being legal and specifically regulated, to illegal or (...) unregulated, and there is considerable disparity between Member States as to how surrogacy arrangements and, in particular, the processes involved therein ought to be regulated’.³⁵ In *C.D.*, AG Kokott made the same observation.³⁶ They also agreed that Directive 92/85 pursues two different, albeit interconnected, objectives, i.e. first, to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy and her giving birth, and, second, to ensure that the special relationship between a woman and her child is protected.³⁷

Nevertheless, AG Wahl and AG Kokott took different views as to whether Directive 92/85 applied to commissioning mothers.

On the one hand, AG Wahl advocated a ‘biological’ understanding of motherhood. He posited that the objective of protecting the special relationship between a woman and her child was a logical corollary of childbirth, so that it lacked independent significance.³⁸ Accordingly, since commissioning mothers were not in ‘an especially vulnerable situation’ arising from childbirth, Directive 92/85 did not apply to them.

On the other hand, AG Kokott reasoned that the special relationship between a woman and her child was of primary importance for the purposes of Directive 92/85. Thus, in order to ensure the unhindered development of that relationship,³⁹ that Directive applied to a commissioning mother who takes the child into her care after she or he is born.⁴⁰ Admittedly, her reading of Directive 92/85 was not entirely consistent with that Directive’s structure and general scheme. In her view, this was because when the EU legislator adopted Directive 92/85, it did not consider the question whether pregnant and breastfeeding workers could be different persons. Indeed, since ‘[in] the early 1990s the practice of surrogacy was not as widespread as it is today’, ‘[it] [was] thus not surprising that the normative structure of Directive 92/85 is based on an approach which takes biological motherhood as the norm’.⁴¹ However, in the light of the objectives pursued by Directive 92/85, AG Kokott stressed

35 Opinion of Advocate General Wahl in C-363/12, EU:C:2013:604, para. 1.

36 Opinion of Advocate General Kokott in C-167/12, EU:C:2013:600, para. 3.

37 See Opinions of Advocate General Wahl in C-363/12, EU:C:2013:604, para. 45, and AG Kokott in Case C-167/12, EU:C:2013:600, para. 45.

38 See Opinion of Advocate General Wahl in C-363/12, EU:C:2013:604, para. 47.

39 See Opinion of Advocate General Kokott in C-167/12, EU:C:2013:600, para. 62.

40 *Ibid.*, para. 68.

41 *Ibid.*, para.39.

the fact that that Directive was open to a ‘dynamic’ interpretation that would better reflect the times in which we live.

18. Despite the fact that surrogacy is more common today than it was twenty years ago, one could, however, argue that the lack of consensus among the laws of the Member States showed that the passage of time had not set aside a biological understanding of motherhood. Arguably, that lack of consensus advised judicial prudence before departing from the historical context in which that Directive was adopted.

In that regard, the ECJ followed, in essence, the Opinion of AG Wahl: Directive 92/85 only applies to female workers who have been pregnant and have given birth to a child.⁴² That said, the ECJ pointed out that Directive 92/85 did not oppose value diversity in the Member States. As Directive 92/85 only establishes certain minimum requirements, nothing prevents Member States from granting maternity leave to commissioning mothers.⁴³

19. *Mayr, C.D.*, and *Z.* are three important judgments illustrating the fact that the ECJ may be called upon to define concepts of a moral, social and even philosophical nature. In so doing, the ECJ acts circumspectly. When defining concepts such as ‘pregnancy’ or ‘motherhood’, the ECJ restricts itself to interpreting those concepts for the sole purposes of the EU measure in question, i.e. Directive 92/85. Hence, it does not seek to provide a general definition of those concepts which would amount to imposing a uniform notion of public morality on all the Member States as this would be contrary to the pluralism on which the EU is founded.

4. The Evaluative Approach

20. However, the existence of divergences among Member State legal systems may not *automatically* rule out the incorporation, into the EU legal order, of a legal principle which is recognized in only a minority of Member States.

As applied by the ECJ, the comparative law method is not tantamount to finding the ‘lowest common denominator’. Nor is that method an arithmetical formula that automatically pinpoints the ‘common denominators’ between the different Member State solutions. Instead, when applying that method, the ECJ ‘chooses from each of the Member States those solutions which, having regard to the objectives of the Treat[ies], appear [to] be the best’.⁴⁴

42 ECJ 18 March 2014, *C.D.*, EU:C:2014:169, curia.europa.eu/juris/documents.jsf?num=C-167/12, para 36; and ECJ 18 March 2014, *Z.*, EU:C:2014:159, curia.europa.eu/juris/documents.jsf?num=C-363/12, para 58.

43 ECJ 18 March 2014, *C.D.*, EU:C:2014:169, curia.europa.eu/juris/documents.jsf?num=C-167/12, paras 41 and 42.

44 See Opinion of AG Lagrange in *Hoogovens/Haute autorité*, EU:C:1962:19, curia.europa.eu/juris/documents.jsf?num=C-14/61, at 283–284.

This shows that the comparative law method and teleological interpretation are deeply intertwined. With a view to ascertaining the different interpretative options available in national legal systems, the ECJ will first have recourse to the comparative law method in order to identify them. Next, it will choose the option which is best suited to the attainment of the objectives pursued by EU law.

21. The way in which this operates may be illustrated by contrasting *Mangold*⁴⁵ with *Akzo*.⁴⁶ In the first case, the ECJ recognized, for the first time, that the principle of non-discrimination on grounds of age constitutes a general principle of EU law. That was so despite the fact that only two Member States had, when *Mangold* was delivered, conferred constitutional status on that principle.

Conversely, in *Akzo*, by opting for the approach followed in the majority of Member States, the ECJ held that legal professional privilege could not cover exchanges within a company or group of companies with in-house lawyers.⁴⁷

22. But how may those two different outcomes be reconciled? The Opinion of AG Kokott in *Akzo* sheds light on the matter. In her view, even if a legal principle is only recognized in a minority of Member States, it may still constitute a general principle of EU law in so far as it reflects a mission with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the protection of fundamental rights. This was the case for the principle of non-discrimination on grounds of age: as Article 19 TFEU shows, fighting age discrimination is, since the Treaty of Amsterdam, one of the objectives sought by the authors of the Treaties. In addition, that principle mirrored a recent trend in the protection of fundamental rights at EU level, which was given concrete expression in the solemn proclamation of the Charter.⁴⁸

By contrast, AG Kokott found that those two elements were missing in *Akzo*. ‘The extension of [legal privilege to in-house lawyers] was not justified on grounds of any special characteristics exhibited by the tasks and activities of the European Commission

45 ECJ 22 November 2005, *Mangold*, EU:C:2005:709, curia.europa.eu/juris/documents.jsf?num=C-144/04.

46 ECJ 14 September 2010, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd / European Commission*, C550/07 P, EU:C:2010:512, curia.europa.eu/juris/documents.jsf?num=C-550/07.

47 *Ibid.*, para. 44. Previously, in ECJ 18 May 1982, *AM & S Europe / European Commission*, EU:C:1982:157, curia.europa.eu/juris/documents.jsf?num=C-155/79, the ECJ, taking account of the common criteria and similar circumstances existing at the time in the laws of the Member States, held that the confidentiality of written communications between lawyers and clients should be protected at EU level.

48 Opinion of Advocate General Kokott in *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, C550/07 P, EU:C:2010:229, para. 96.

as competition authority.⁴⁹ Nor did it currently ‘constitute a growing trend among the Member States, be it in the area of competition law or in any other field’.⁵⁰

23. Whilst the absence of consensus at national level does not preclude the ECJ from finding the law of the EU, such absence does counsel it to proceed with caution. When considering a particular case, the ECJ will want to avoid ‘going too far’ and may therefore opt for a solution which is not necessarily the most ambitious, considered from the exclusive angle of EU law, but which has the advantage of being ‘compatible’ with the traditions of the Member States and of not hurting special sensitivities in certain Member States.

24. In the same way, when examining the compatibility of a national measure with EU law, the ECJ will ‘gauge the temperature’ of the Member State legal systems in order to ascertain the credibility and ‘acceptability’ of its decision for the whole of the EU. It follows that, in so far as there is no EU harmonization and national diversity does not call into question one of the principles on which the EU is founded, the lack of consensus militates in favour of finding a solution that does not risk encountering incomprehension or resistance in some Member States, which could undermine the effectiveness and the uniform application of EU law.

25. This point is illustrated by the case law of the ECJ relating to online gambling. In *Liga Portuguesa de Futebol Profissional*, for example, the question was whether the host Member State could prohibit a service provider established in another Member State from offering games of chance via the internet within the territory of the first Member State.

The ECJ held that such prohibition constituted a restriction on the freedom to provide services that needed to be justified by overriding reasons in the public interest, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order.⁵¹

In addition, that prohibition had to comply with the principle of proportionality. In that context, the ECJ noted that ‘the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States’. ‘In the absence of harmonisation in the field at

49 She also observed that, in the course of antitrust proceedings, the powers of the Commission are similar to those of Member State competition authorities. Hence, ‘if the vast majority of the Member States have no need to deny the competition authorities access to communications between an undertaking and its enrolled in-house lawyers, it is safe to assume that there is no compelling need to extend the scope of legal professional privilege at European Union level either’. *Ibid.*, para. 99.

50 *Ibid.*, para. 98.

51 See, e.g. ECJ 8 September 2009, C42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd*, EU:C:2009:519, curia.europa.eu/juris/documents.jsf?num=C-42/07, para. 56.

EU level,' the ECJ wrote, 'it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected'.⁵² This meant, in essence, that the ECJ applied a version of the principle of proportionality that allowed room for value diversity. '[T]he mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end'.⁵³ Accordingly, the ECJ did not look for the least restrictive alternative to the freedom to provide services that it could think of, but examined the compatibility of the national measure in question with the principle of proportionality by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure.

5. Concluding Remarks

26. Although, in the EU, consensus 'is only a complementary element to judicial reasoning and is thus not an independent logical structure on which the courts rely', it 'provides the [ECJ] with a link to popular opinion and the empirical realities of the extrajudicial environment'.⁵⁴ This helps EU citizens to identify themselves with the values promoted by the EU, which is something very important in the light of the times in which we live.

As applied by the ECJ, the comparative law method favours a dynamic interpretation of EU law. Where societal change brings about a high degree of convergence in the laws of the Member States, that method enables the EU legal order to cope with those changes, thereby aligning the EU's legal culture with those of its Member States.

27. A consensus-based analysis enables an evolving interpretation of EU law: the emergence of a consensus may militate in favour of departing from existing case law that has, with the passage of time, become inconsistent with contemporary societal values.

However, the existence of consensus among the Member States is not by itself decisive. It must leave room for the EU legal order to preserve its autonomy. Admittedly, the existence of such consensus plays an important role in supplying the content of EU law, notably in discovering general principles of EU law. The same applies when the ECJ engages in federal common law-making. But the incorporation into EU law of a norm based on consensus among the Member

52 *Ibid.*, para. 57.

53 *Ibid.*, para. 58.

54 B. PETKOVA, 'The Notion of Consensus as a Route to Democratic Adjudication?', 14. *Cambridge Yearbook of European Legal Studies* 2011-2012, p (663) at 693 and 695.

States must always be made subject to its consistency with the founding principles of that law.

In the same way, the absence of such a consensus does not prevent the ECJ from having recourse to other sources of law, such as international law, or from applying other methods of interpretation. That said, as the *Mayr*, *C.D.*, and *Z.* cases demonstrate, the absence of a consensus counsels the ECJ to act with caution.

28. In addition, the application of the comparative law method at EU level may give rise to a ‘spill-over effect’ triggering public debate in the Member States in which the solution advocated by the ECJ is not present in their law. That approach produces cross-fertilization and mutual influence between the EU and national legal orders, thereby creating a ‘common legal space’ and giving concrete meaning to the motto ‘United in diversity’.

